

1 James R. Condo (#005867)  
2 Amanda Sheridan (#005867)  
3 SNELL & WILMER L.L.P.  
4 One Arizona Center  
5 400 E. Van Buren  
Phoenix, AZ 85004-2204  
Telephone: (602) 382-6000  
JCondo@swlaw.com  
ASheridan@swlaw.com

6 Richard B. North, Jr. (admitted *pro hac vice*)  
7 Georgia Bar No. 545599  
8 Matthew B. Lerner (admitted *pro hac vice*)  
9 Georgia Bar No. 446986  
NELSON MULLINS RILEY & SCARBOROUGH, LLP  
10 Atlantic Station  
11 201 17th Street, NW, Suite 1700  
Atlanta, GA 30363  
Telephone: (404) 322-6000  
Richard.North@nelsonmullins.com  
Matthew.Lerner@nelsonmullins.com

12 *Attorneys for Defendants*  
13 *C. R. Bard, Inc. and*  
*Bard Peripheral Vascular, Inc.*

14  
15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF ARIZONA**

17 IN RE: Bard IVC Filters Products Liability MDL NO. 15-02641-PHX-DGC  
18 Litigation

19 This Document Relates to:

20 HUMBERTO MOYA,

21 Plaintiff,

Case No. 2:17-CV-02990-DGC

22 v.

23 C. R. BARD, INC., a New Jersey  
24 Corporation; AND BARD PERIPHERAL  
VASCULAR INC., an Arizona  
Corporation,

**DEFENDANTS' MOTION TO  
DISMISS PLAINTIFF'S COMPLAINT  
FOR FAILURE TO COMPLY WITH  
AMENDED CASE MANAGEMENT  
ORDER NO. 5**

25 Defendants.  
26  
27  
28

1 Pursuant to Fed. R. Civ. P. 12(b) Defendants C. R. Bard, Inc. and Bard Peripheral  
 2 Vascular, Inc. (“Bard”) respectfully move this Court to dismiss Plaintiff Humberto Moya’s  
 3 Complaint for failure to comply with the terms of Amended Case Management Order No. 5  
 4 pertaining to timely service of Plaintiff Profile Forms (“PPF”).

5 **I. PROCEDURAL HISTORY**

6 On September 1, 2017, Plaintiff filed a Short Form Complaint in MDL 2641, *In Re:*  
 7 *Bard IVC Filters Products Liability Litigation*, and subsequently, served Bard with a copy of  
 8 the Summons and Complaint on September 6, 2017. *See* Waiver Transmittal Email from  
 9 Plaintiff’s counsel attached hereto as Exhibit A. On March 3, 2016, this Court entered Case  
 10 Management Order No. 5 [Doc. 927] (the “Order”) which ordered, in part:

11 In cases that have been filed in, removed to or transferred to this  
 12 MDL on or after the date of this Order, each plaintiff shall submit  
 13 a completed PPF to defendants within 60 days of filing the  
 14 complaint.

15 *Id.* at 1:18-19. The Order further made clear that:

16 If a plaintiff does not submit a PPF within the time specified in  
 17 this Order, defendants shall mail an overdue letter by e-mail and  
 18 U.S. mail to Plaintiffs’ Co-Lead Counsel and the plaintiffs’  
 19 individual representative counsel, stating that defendants may  
 20 move to dismiss that plaintiff’s case within 20 days of receipt of  
 21 the letter. If no PPF is received within those 20 additional days,  
 22 defendants may move immediately to dismiss that plaintiff’s case.

23 *Id.* at 2:17-22.

24 Plaintiff’s PPF was due to be served within sixty (60) days of filing the complaint, to  
 25 wit: Tuesday, October 31, 2017, but Bard was not served with Plaintiff’s PPF by that date.  
 26 Subsequently, on November 20, 2017; January 22, 2018; and April 6, 2018 , counsel for Bard  
 27 sent Plaintiff’s Co-Lead Counsel and individual representative counsel an overdue letter via  
 28 email and U.S. Mail notifying Plaintiff’s counsel of the overdue PPF and Bard’s right under  
 the Order to move to dismiss the Complaint for failure to comply with the protocol set forth  
 by the Order. *See* emails and letters from Bard’s counsel, attached as Exhibit B. To date, Bard  
 still has not received a PPF from Plaintiff in response to its overdue letters.

## II. ARGUMENT AND CITATION TO AUTHORITY

The Ninth Circuit has ruled that at least one federal district court sitting over an MDL action did not abuse its discretion in dismissing certain plaintiff's complaints for failure to comply with case management orders related to service of plaintiff fact sheets. *In re: Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1232-34 (9th Cir. 2006).

Here, the Court entered an Order governing the timely service of PPFs, and providing a clear protocol for sending and responding to PPF overdue (and deficiency) letters. Plaintiff failed to serve a PPF within sixty (60) days of the filing of the complaint, failed to serve a PPF within twenty (20) days of receiving the first overdue letter, and has subsequently ignored three (3) additional requests to serve a PPF upon Bard; thereby, delaying the discovery process and forcing Bard to incur the cost of filing this Motion. Accordingly, Plaintiff's Complaint may be dismissed by the Court pursuant to the terms of Case Management Order No. 5 [Doc. 927].

WHEREFORE, Bard respectfully requests that this Court enter an Order dismissing Plaintiff's Complaint for the foregoing reasons. For the Court's convenience, a proposed order is attached as Exhibit C.

This 28<sup>th</sup> day of June, 2019.

s/Richard B. North, Jr.  
Richard B. North, Jr.  
Georgia Bar No. 545599  
Matthew B. Lerner  
Georgia Bar No. 446986  
NELSON MULLINS RILEY & SCARBOROUGH, LLP  
Atlantic Station  
201 17th Street, NW / Suite 1700  
Atlanta, GA 30363  
PH: (404) 322-6000  
FX: (404) 322-6050  
Richard.North@nelsonmullins.com

James R. Condo (#005867)  
Amanda Sheridan (#005867)  
SNELL & WILMER L.L.P.

1 One Arizona Center  
2 400 E. Van Buren  
3 Phoenix, AZ 85004-2204  
4 PH: (602) 382-6000  
5 JCondo@swlaw.com  
6 ASheridan@swlaw.com

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**Attorney for Defendants C. R. Bard, Inc. and  
Bard Peripheral Vascular, Inc.**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 28, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notification of such filing to all counsel of record.

s/Richard B. North, Jr.  
Richard B. North, Jr.  
Georgia Bar No. 545599  
NELSON MULLINS RILEY & SCARBOROUGH, LLP  
Atlantic Station  
201 17th Street, NW / Suite 1700  
Atlanta, GA 30363  
PH: (404) 322-6000  
FX: (404) 322-6050  
Richard.North@nelsonmullins.com